

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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MAHMOUD A. NADA,

Plaintiff,

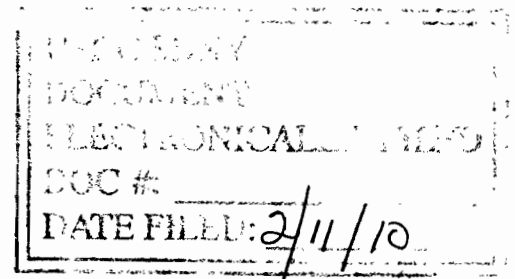
- against -

**1199 SEIU HEALTH CARE
EMPLOYEES UNION,**

Defendant.
----- X

**MEMORANDUM OPINION
AND ORDER**

09 Civ. 5796 (SAS)



SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Pro se plaintiff Mahmoud Nada seeks to recover lost wages “due to misrepresentation” by defendant 1199 SEIU Health Care Employees Union (“1199”). Liberally construed, Nada’s claim is for breach of the duty of fair representation. 1199 now moves for summary judgment. Because Nada’s claim is time-barred, 1199 is entitled to summary judgment.

II. BACKGROUND

Nada was hired by Brooklyn Hospital in October 1990 as a

Laboratory Technologist, and he remains in this position.¹ Nada and other employees in his job classification were represented by Local 144 SEIU (“144”) through May 31, 1998.² On June 1, 1998, 144 merged into 1199.³

Shortly after this merger, Nada came to believe that the differences in pay rates should be eliminated between former-144 Lab Technologists and their counterparts covered by a master contract (“the League Agreement”) between 1199 and the League of Voluntary Hospitals and Homes (“the League”).⁴ Nada concluded that 1199 was not representing him adequately when no changes in pay practices materialized.⁵ In particular, Nada was concerned that 1199 had failed to follow through on a May 2004 side letter agreement between Dennis Rivera, President of 1199, and Bruce McIver, President of the League (which was representing Brooklyn Hospital), to “establish a committee to explore ways of raising 144 minimums and experience steps to comparable levels of the League

¹ See Defendant’s Rule 56.1 Statement of Material Facts Not in Dispute (“Def. 56.1”) ¶¶ 1, 2.

² See *id.* ¶ 3.

³ See *id.* ¶ 4.

⁴ See *id.* ¶ 6; see also *id.* ¶ 5.

⁵ See *id.* ¶ 7.

uniform classification rates.”⁶ Despite the formation of a committee, 1199 and the League have never agreed on terms to raise former-144 minimums.⁷ On October 30, 2007, Nada signed a grievance form complaining about 1199’s and the League’s need to live up to “their agreement of raising 144 minimums . . . and experience steps to the comparable levels of the League . . . salaries/classification rates.”⁸

Nada filed this action against 1199 on June 5, 2009. His entire allegation is “loss of wages due to misrepresentation.”⁹ He seeks “loss of wages for \$25,000 with interest from 10/24/1990.”¹⁰ Nada gave the following testimony at his deposition:

A. Let me just explain to you, we discuss here the salary, not violations of anything in the contract. We discuss the salary that we belong in this contract like

⁶ Side Letter Regarding 144 Minimums, Ex. 4 to Affidavit of Daniel J. Ratner, Defendant’s Counsel. *Accord* Def. 56.1 ¶¶ 7, 18.

⁷ *See* Def. 56.1 ¶¶ 19-22.

⁸ 1199 SEIU Grievance Form, Ex. 2 to Second Declaration of Robert H. Stroup, Defendant’s Counsel, in Support of Defendant’s Motion for Summary Judgment (“Second Stroup Decl.”). *See also* Grievance Signature Page, Ex. 3 to Second Stroup Decl.; Deposition of Mahmoud A. Nada (“Nada Dep.”) at 49-50, Ex. 1 to Second Stroup Decl.; Def. 56.1 ¶ 8.

⁹ Summons with Endorsed Complaint, No. CV-024650-09/NY (Civ. Ct. City of New York), Ex. 1 to 1199’s Petition for Removal of State Court Action.

¹⁰ *Id.*

same everybody else, and we have two different salaries. That's what we are talking about. Do you understand?

Q. All right.

A. I am talking about I am underpaid and the union knows I am underpaid for a long time. The union [President] promise us that he is going to make committee to do, to adjust our salary. And nothing was done until now for years and we keep losing salary.

Q. And that's your claim?

A. Yes.

Q. And really there isn't a claim that there is a specific provision of the collective bargaining agreement that the employer is violating?

A. It is not employer is violating. This was supposed to be enforced.

Q. The letter of May 7, 2004 attached to Defendant's Exhibit B, that is the basis for your complaint; is that fair to say?

A. Yes.¹¹

Nada's deposition testimony makes clear that his complaint concerns the May 2004 side letter agreement and 1199's inability to raise the minimum rate for the position of Laboratory Technologist at Brooklyn Hospital to the same level as the Laboratory Technologist rate in the League Agreement.

¹¹ Nada Dep. at 77-78, Ex. 1 to Declaration of Robert H. Stroup in Support of Defendant's Motion for Summary Judgment.

III. DISCUSSION

Liberal construed, Nada alleges that 1199 has breached its duty of fair representation.¹² In *DelCostello v. Teamsters*, the Supreme Court held that the six-month statute of limitations of section 10(b) of the National Labor Relations Act applies to cases in which employees sue both their employer for breach of the collective bargaining agreement pursuant to section 301(a) of the Labor Management Relations Act, and their union for breach of its duty of fair representation.¹³ In reaching this conclusion, the Court rejected the notion that state statute of limitation periods for vacating an arbitration award and for legal malpractice were applicable to such claims.¹⁴ The Second Circuit has held

¹² See *DelCostello v. Teamsters*, 462 U.S. 151, 170 (1983) (observing that the duty of fair representation is implied under the scheme of the National Labor Relations Act and such claims “are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions”); *Walker v. Columbia Univ.*, 756 F. Supp. 149, 152 n.2 (S.D.N.Y. 1991) (“A union’s duty of fair representation is a judicially implied duty, which requires that the union ‘represent fairly the interests of all bargaining unit members during the negotiation, administration and enforcement of collective bargaining agreements.’” (quoting *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 46-47(1979))).

¹³ See *DelCostello*, 462 U.S. at 170-72; *White v. White Rose Food*, 128 F.3d 110, 114 (2d Cir. 1997); *Walker*, 756 F. Supp. at 152-53.

¹⁴ See *DelCostello*, 462 U.S. at 165-69. In this regard, Nada’s argument that the applicable statute of limitations should be the six-year limitation period of *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), or New York’s three-year statute of limitations period for malpractice actions is without merit. See Plaintiff’s Opposition to Defendant’s Motion for Summary Judgment. In *DelCostello*, the Court explained that “our holding [in *United Parcel Service*] was limited to the

“*DelCostello* to require that the § 10(b) six-month limitations period also be applied to unfair representation claims standing alone”¹⁵

“A cause of action based on the duty of fair representation accrues when the union members know or reasonably should know that a breach of that duty has occurred.”¹⁶ “[O]nce the plaintiffs learn of the union’s breach, the union’s subsequent failure to fairly represent plaintiffs cannot be treated as a ‘continuing violation’ that precludes the running of the limitations period.”¹⁷

Here, Nada asserts that 1199 breached the duty of fair representation by failing to remedy the pay differential for certain of the former-144 members through the committee created by the May 2004 side letter agreement. Nada was aware of this claim on October 30, 2007, when he signed a grievance form

employee’s claim against the employer; we did not address what state statute should govern the claim against the union.” 462 U.S. at 154. *DelCostello* also expressly rejected the use of New York State’s legal malpractice limitations period, which had been adopted by the Court of Appeals in that case. *See id.* at 172 (“The Court of Appeals held the suit timely under a state 3-year statute for malpractice actions. Since we hold that the suit is governed by the 6-month provision of 10(b), we reverse the judgment.”).

¹⁵ *Eatz v. DME Unit of Local Union No. 3*, 794 F.2d 29, 33 (2d Cir. 1986)

¹⁶ *Id.*

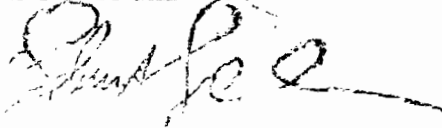
¹⁷ *Propst v. Association of Flight Attendants*, 546 F. Supp. 2d 14, 20 (E.D.N.Y. 2008) (quoting *Buttry v. General Signal Corp.*, 68 F.3d 1488, 1492 (2d Cir. 1995)).

complaining about 1199's failure to secure the raises and benefits mentioned in that agreement. Therefore, the six-month limitation period in which to bring this cause of action expired, at the latest, on April 30, 2007. Because Nada did not commence this action until June 5, 2009, it is untimely.

IV. CONCLUSION

For the reasons set forth above, 1199's motion for summary judgment is granted. The Clerk of the Court is directed to close this motion (document number 10) and this case.

SO ORDERED:

A handwritten signature in black ink, appearing to read 'Shira A. Scheindlin', is written over a horizontal line.

Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
February 11, 2010

- Appearances -

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